

\*E-Filed 6/15/11\*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DONTE COROTHERS,

No. C 11-1194 RS (PR)

Plaintiff,

**ORDER DISMISSING COMPLAINT  
WITH LEAVE TO AMEND**

v.

SALINAS VALLEY STATE PRISON,  
et al.,

Defendants.

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*

No. C 11-1194 RS (PR)  
ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

1 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

2 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
3 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)  
4 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
5 plausibility when the plaintiff pleads factual content that allows the court to draw the  
6 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
7 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions  
8 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from  
9 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).  
10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
11 (1) that a right secured by the Constitution or laws of the United States was violated, and  
12 (2) that the alleged violation was committed by a person acting under the color of state law.  
13 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

#### 14 **B. Legal Claims**

15 Plaintiff alleges that he suffered an Eighth Amendment violation when he slipped and  
16 fell outside a prison shower because defendants had not cleaned up a puddle of water on the  
17 floor. More specifically, plaintiff alleges that defendants are liable for (1) deliberate  
18 indifference; (2) failure to protect; (3) breaching their mandatory duty; and (4) intentional  
19 infliction of emotional distress. Plaintiff has not alleged sufficient facts to state a claim for  
20 (1)–(3). What he describes amounts to negligence, or, at worst, gross negligence, neither of  
21 which is sufficient to state a claim for deliberate indifference under the Eighth Amendment.  
22 *See Farmer v. Brennan*, 511 U.S. 825, 835–36 (1994).

23 A prison official is deliberately indifferent if he knows that a prisoner faces a  
24 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to  
25 abate it. *See id.* at 837. The prison official must not only “be aware of facts from which the  
26 inference could be drawn that a substantial risk of serious harm exists,” but “must also draw  
27 the inference.” *Id.* Consequently, in order for deliberate indifference to be established, there  
28

1 must exist both a purposeful act or failure to act on the part of the defendant and harm  
 2 resulting therefrom. *See McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992). Plaintiff  
 3 has not shown that defendants' actions created a substantial risk of serious harm. Not only  
 4 has he failed to state how serious his injuries were, plaintiff's allegations are not sufficient to  
 5 overcome the fact that minor safety hazards have not been found to violate the Eighth  
 6 Amendment. *Osolinski v. Kane*, 92 F.3d 934, 938 (9th Cir. 1996).

7 Accordingly, claims (1)–(3) are DISMISSED with leave to amend. Plaintiff shall file  
 8 an amended complaint addressing the deficiencies detailed above within 30 days from the  
 9 date this order is filed. The first amended complaint must include the caption and civil case  
 10 number used in this order (11-1194 RS (PR)) and the words FIRST AMENDED  
 11 COMPLAINT on the first page. Because an amended complaint completely replaces the  
 12 previous complaints, plaintiff must include in his first amended complaint all the claims he  
 13 wishes to present and all of the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963  
 14 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material from the prior  
 15 complaint by reference. Failure to file an amended complaint in accordance with this order  
 16 will result in dismissal of this action without further notice to plaintiff.

17 Claim (4) is DISMISSED without leave to amend. Intentional infliction of emotional  
 18 distress is a state tort claim, and therefore is not remediable under § 1983, though a federal  
 19 court may exercise supplemental jurisdiction over state claims that form part of the same case  
 20 or controversy as the cognizable federal claims. 28 U.S.C. § 1367(a). The Court declines to  
 21 exercise supplemental jurisdiction over this state tort claim. This dismissal is without  
 22 prejudice.

23 //

24 //

25 //

26 //

27 //

28

1 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
2 informed of any change of address by filing a separate paper with the clerk headed "Notice  
3 of Change of Address." He must comply with the Court's orders in a timely fashion or ask  
4 for an extension of time to do so. Failure to comply may result in the dismissal of this action  
5 pursuant to Federal Rule of Civil Procedure 41(b).

6 **IT IS SO ORDERED.**

7 DATED: June 15, 2011

8   
9 RICHARD SEEBORG  
10 United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
For the Northern District of California